Office-Supreme Court, U.S.
FILED
SEP 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 228

SAFEWAY TRAILS, INC., a Corporation of the State of Maryland, *Appellant*,

v.

DAVID D. FURMAN, Attorney General of the State of New Jersey and Head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles; and JOHN A. KERVICK, State Treasurer of New Jersey, *Respondents*.

On Appeal from the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION TO MOTION TO DISMISS

WILLIAM A. ROBERTS
MORRIS J. LEVIN
1012 14th Street, N. W.
Washington, D. C.
Attorneys for Appellant

ROBERTS & McINNIS
1012 14th Street, N. W.
Washington, D. C. 20005
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Introductory Paragraph	1
Questions Presented	2
Statement of the Case	3
Summary of Argument	5
Argument	6
Point 1	6
Point 2	9
Conclusion	14

CITATIONS

CASES:

Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U.S. 495, 92 L. Ed. 99 (1947)	10
Aero Mayflower T. Co. v. Georgia Public Service Comm., 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709 (1935)	6, 8
Capitol Greyhound Lines v. Brice, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950)	12
Continental Baking Co. v. Woodward, 286 U.S. 352, 76 L. Ed. 1155, 52 S. Ct. 595 (1932)	6, 8
Clark v. Poor, 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702 (1927)	10
Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435 (1939)	6
Hicklin v. Coney, 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142 (1933)	6, 8
Ingels v. Morf, 300 U.S. 290, 81 L. Ed. 653, 57 S. Ct. 439 (1937)	13
Interstate Motor Freight System v. Messner, 347 U.S. 941, 98 L. Ed. 1090 (1954)	8
Interstate Transit v. Lindsey, 283 U.S. 183, 75 L. Ed. 953, 51 S. Ct. 380 (1931)	10, 11

Page

Kane v. New Jersey, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916) 10
Morf v. Bingaman, 298 U.S. 407, 80 L. Ed. 1245, 56 S. Ct. 756 (1936) 10
New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 69 A. 2d 875 (1949) 12
Shirks Motor Express Corp. v. Messner, 375 Pa. 450, 100 A. 2d 913 (1953) 8, 9
Smith v. Cahoon, 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931) 6, 8, 9

CONSTITUTION OF UNITED STATES:

Article 1, Section 8, clause 3 2
Fourteenth Amendment 2, 6

NEW JERSEY CONSTITUTION OF 1947:

Article VIII, Sec. 2, par. 2 ..... 4, 12

STATUTES:

N.J.S.A. 27:23-1 ..... 4, 12
N.J.S.A. 48:4-14 7
N.J.S.A. 48:4-20 ..... 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
N.J.S.A. 48:4-23 ..... 4, 12
N.J.S.A. 54:39-1 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 228

SAFEWAY TRAILS, INC., a Corporation of the State of Maryland, *Appellant*,

v.

DAVID D. FURMAN, Attorney General of the State of New Jersey and Head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles; and JOHN A. KERVICK, State Treasurer of New Jersey, *Respondents*.

On Appeal from the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTORY PARAGRAPH

Pursuant to Rule 16 (3) of this Court, Safeway Trails, Inc., appellant, through its counsel, submits this brief in opposition to the motion to dismiss filed on July 23, 1964 by the respondents. The time for filing the instant brief was extended to September 11,

1964 by Order of Associate Justice Tom C. Clark on August 6, 1964.

Appellant does not disagree with respondents' brief in support of the motion to dismiss with respect to Opinion Below or to the facts in the Statement of the Case. It is appellant's view that respondents have misdescribed the Questions Presented and that the Statement of the Case must be supplemented.

QUESTIONS PRESENTED

Whether the application of the mileage tax imposed under N.J.S.A. 48:4-20 to Safeway Trails, Inc., an interstate autobus carrier, with respect to its interstate mileage operated over the New Jersey Turnpike, is in conflict with the Constitution of the United States, specifically:

1. The equal protection clause of the Fourteenth Amendment; because the application of N.J.S.A. 48:4-20 to only the interstate motor bus mileage on the New Jersey Turnpike constitutes an arbitrary and unreasonable classification, subjecting Safeway Trails, Inc. to a tax as well as tolls, while intrastate carriers, which make like use of the New Jersey Turnpike, do not pay a tax for mileage operated on the Turnpike?

2. The commerce clause in Article 1, Section 8, clause 3, because the tax, which is an excise charged by the State of New Jersey for the privilege of using its highways, cannot be construed to be compensation for the use of the New Jersey Turnpike since the State does not contribute to its cost or expense, and thus bears no reasonable relation to the privilege of using the Turnpike and because the tax is discriminatory and a burden on interstate commerce.

STATEMENT OF THE CASE

Safeway Trails, Inc. does *not* travel over or use the Garden State Parkway (Respondents' brief, p. 5). Therefore, the several references to the Parkway in respondents' brief, rather than providing a "more accurate presentation of the issues," serve only to confuse the specific issues raised by the appellant. This is particularly the case with the expenses allegedly incurred by the State of New Jersey because of public use of its two toll roads (Respondents' brief, pp. 7, 8). While the State of New Jersey does operate and maintain certain portions of the Garden State Parkway, it does not maintain, operate or supervise any portion of the New Jersey Turnpike.

Though respondents' brief refers generally to the "many diverse expenses" incurred by the State of New Jersey because of both toll roads, the record provides only vague references to such expenses, and fails to identify the costs of the various programs involved, the costs assignable to the two toll roads, or the specific costs incurred because of the toll road here in issue, the New Jersey Turnpike (R. 127a-130a, 145a, 146a, 182a, 183a, 192a-197a, 212a-215a). No single specific identifiable unreimbursed expense was established by the State as a dollar cost incurred because of the New Jersey Turnpike.

The record does disclose that the New Jersey Turnpike Authority has paid every bill and charge levied against it by the State (R. 101a), including the cost of original acquisition, the maintenance, training and support of the police force, amounting to $1,161,947.00 during 1961 (R. 110a-111a, 168a-170a), the purchase of State license tags for use on vehicles owned and operated by the Turnpike Authority (R. 116a, 125a), and

reimbursement for expenses incurred by the State Highway Department, including the original preturnpike outlay of over $11,000,000.00 (R. 143a; 171a). The Turnpike Authority has met such bills without difficulty from the collection of tolls and has accrued reserve funds aggregating $30,918,754.00 (R. 122a). Such broad governmental expenses as were incurred by the State would be offset by the traffic and speeding fines collected on the Turnpike, amounting to $331,103.00 in 1960. These fines since 1951 have reached a total of $2,313,524.00, which, together with total court costs of $883,438.00, have been paid to the State of New Jersey (R. 167a-168a, 188a).

The New Jersey Constitution of 1947, Article VIII, Section 2, paragraph 2, provides that "no money shall be drawn from the State treasury but from appropriations made by law." The State is *specifically enjoined* from providing financial aid or support to the Turnpike Authority by N.J.S.A. 27:23-1. This would indicate that the expenses referred to by respondents were illegal if made, unless they were so infinitesimal as to prevent reasonable calculation.

In 1961, Safeway Trails, Inc. paid the State of New Jersey $36,611.98 pursuant to N.J.S.A. 48:4-20 for interstate mileage over the Turnpike, in addition to payment of tolls of $218,042.00 to the Turnpike Authority (R. 234a, 315a). The $36,611.98 collected by the State pursuant to N.J.S.A. 48:4-20 could not be expended in support of the Turnpike, or in its construction, maintenance or supervision. N.J.S.A. 27:23-1. The use of funds received pursuant to this excise tax is provided for by N.J.S.A. 48:4-23, as follows:

> All moneys derived from the excise hereby imposed shall be paid over monthly by the director

of the division of motor vehicles to the state treasurer and such revenues are hereby appropriated to the state highway department for use by it for the construction and maintenance of highways.

Though, the New Jersey Supreme Court did find that there were general expenses incurred by the State with regard to the New Jersey Turnpike, there is no record of any specific expense which was legally incurred and not reimbursed by the Turnpike Authority.

SUMMARY OF ARGUMENT

Appellant raises but two issues before this Court, and both are based upon Constitutional grounds and supported by decisions of this Court. Appellant does not dispute the validity of N.J.S.A. 48:4-20 *per se*, nor its application by the State of New Jersey from enactment until 1960, but does contest the administrative interpretation by the State in 1960 that the excise tax prescribed by N.J.S.A. 48:4-20 applied to appellant's interstate mileage on the Turnpike. This interpretation was rejected by the Superior Court of New Jersey (76 N.J. Super. 90, 183 A. 2d 788), but thereafter affirmed by the Supreme Court of New Jersey (41 N.J. 467, 197 A. 2d 366).

It is appellant's contention that in the administration of a tax statute a state cannot so apply the tax as to create a situation where like persons engaging in basically identical activities are treated in an unequal fashion. The application of the mileage tax in N.J. S.A. 48:4-20 to appellant's interstate mileage over the New Jersey Turnpike, without the imposition of a similar levy upon intrastate bus operators similarly conducting scheduled regular route service over the Turnpike, constitutes an unreasonable classification,

denying to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The excise in N.J.S.A. 48:4-20 is levied as a privilege for using the highways of New Jersey. The application of this tax to interstate mileage over the New Jersey Turnpike, though the State is proscribed from providing financial aid or support to the construction, maintenance or supervision of the Turnpike, is not in compensation for the privilege granted by the tax, and constitutes an undue burden on interstate commerce.

ARGUMENT

Point 1.

The Application of N.J.S.A. 48:4-20 to Interstate Mileage Over the New Jersey Turnpike Denies to Safeway Trails, Inc. the Equal Protection of the Laws.

That this Court has jurisdiction to determine whether the State of New Jersey, through the application of N.J.S.A. 48:4-20 to appellant's interstate mileage over the New Jersey Turnpike has denied to appellant the equal protection of the laws is supported by the decisions in *Smith* v. *Cahoon*, 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931); *Continental Baking Co.* v. *Woodward*, 286 U.S. 352, 76 L. Ed. 1155, 52 S. Ct. 595 (1932); *Hicklin* v. *Coney*, 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142 (1933); *Aero Mayflower T. Co.* v. *Georgia Public Service Comm.*, 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709 (1935); and *Dixie Ohio Express Co.* v. *State Revenue Comm.*, 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435 (1939). Respondents have attempted to evade this issue by simply postulating that the classification created by such application of the statute is reasonable, and then going on to discuss and argue

matters not in contention herein (Respondents' brief, pp. 13-15).

The application of N.J.S.A. 48:4-20 to interstate mileage traversed on the highways of New Jersey was never contested from the enactment of the statute in 1927 until 1960. (Prior to transfer of interstate bus operations to the Turnpike, the State by its highest administrative authority held that the tax was not applicable to such mileage. (Attorney General of New Jersey, Formal Opinion No. 78-1950.) As noted by the respondents, this tax on interstate operators was complemented by the tax levied upon intrastate operators in N.J.S.A. 48:4-14. Other taxes, such as the tax on the sale of motor fuels in N.J.S.A. 54:39-1 *et seq.*, have like application to both interstate and intrastate motor bus operators, although the latter were the beneficiaries of major offsets arising from municipal operations. In other words, up until 1960 both interstate and intrastate bus operators were taxed in approximately equal fashion, though under differing formulas, and there was no question of the power or authority of the State to levy the excise in N.J.S.A. 48:4-20 as it was applied against the appellant's off turnpike mileage.

From the opening of the Turnpike in 1951, both interstate and intrastate operators were required to pay tolls for the use of the Turnpike to the Turnpike Authority. In 1960 the State so construed N.J.S.A. 48:4-20 as to include interstate mileage on the Turnpike, and thereby disturbed the balance theretofore in effect in the taxation of interstate and intrastate carriers.

Appellant's argument is not based upon a claim of "double taxation," as the respondents would have the Court believe, but upon the unreasonable classification

which is the result of applying the mileage tax to interstate mileage over the Turnpike. Intrastate carriers regularly use the New Jersey Turnpike in regular route scheduled service, similar to the operations conducted over the Turnpike by interstate carriers (R. 121a). The 1960 interpretation that N.J.S.A. 48:4-20 included interstate mileage over the Turnpike resulted in a new classification—interstate versus intrastate—without a reasonable or rational basis.

This Court has held that a state has broad discretion in making classifications, but that a classification must have a valid relation to the purpose for which it is made. In the case *sub judice*, both types of carriers make the same type of use of the New Jersey Turnpike, both carrying passengers in buses in regular route scheduled service. *Smith* v. *Cahoon, supra; cf., Continental Baking Co.* v. *Woodward, supra; Hicklin* v. *Coney, supra; Aero Mayflower T. Co.* v. *Georgia Public Service Comm., supra;* and *Dixie Ohio Express Co.* v. *State Revenue Comm., supra.*

Respondents have attempted to equate this case with the decision in *Shirks Motor Express Corp.* v. *Messner*, 375 Pa. 450, 100 A.2d 913 (1953), app. dism. sub. nom. *Interstate Motor Freight System* v. *Messner*, 347 U.S. 941, 98 L. Ed. 1090 (1954), where there was also a claim of denial of equal protection (Respondents' brief, pp. 16-18). However, in the *Shirks* case the tax, applied equally against both intrastate and interstate carriers, was an excise for the use of the highways to the cost of which Pennsylvania contributed and was based upon mileage operated in that Commonwealth. The carrier therein claimed a denial of equal protection because Pennsylvania included in its formula the mileage traveled over the Pennsylvania Turnpike for which

the carrier had paid tolls. The facts and the applicable laws in the *Shirks* decision do not meet the issue raised herein by appellant, since there was no arbitrary classification involved in the Pennsylvania statute, where both intrastate and interstate carriers were treated equally.

Appellant relies on *Smith* v. *Cahoon*, *supra*, and the other cases cited above, as demonstrating the jurisdiction of this Court where a state has, without rational basis, created a classification favoring one type of carrier to the detriment of another. In that such classification has resulted in a cost to Safeway Trails, Inc. of over $36,000.00 in one year and continues in larger amounts, without a like or comparable levy upon intrastate operators, Safeway Trails, Inc. contends that this issue is substantial.

Point 2.

The Mileage Tax for the Privilege of Conducting Interstate Operations Over the New Jersey Turnpike Without a Compensating Expense by the State in Providing This Privilege Constitutes an Undue Burden on Interstate Commerce.

In urging this Court to find probable jurisdiction with regard to the issue of burden on commerce, appellant does not argue that it is subjected to double taxation, nor does it contend that tolls are taxes, or that there is a legal equation between the tolls paid to the Turnpike Authority and the excise tax paid under N.J.S.A. 48:4-20, as respondents' brief would imply. Further, the reliance by respondents on the *Shirks* case is unfounded. The appellant in *Shirks* claimed that there was a burden on commerce on the basis of a mistaken belief that the tax was on physical location and the extent of routes, whereas in fact the tax was on

a mileage basis and the sums collected were to be used on the highways. The claim of burden did not include the question of the payment of a tax based on mileage in addition to tolls, which was the basis for the carrier's claim that there was a denial of equal protection of the laws (*supra*).

This Court has differentiated between a tax for the privilege of using the highways and a tax the proceeds of which are devoted to the maintenance, upkeep and supervision of the highways. *Aero Mayflower Transit Co.* v. *Board of R. R. Commissioners*, 332 U.S. 495, 92 L. Ed. 99 (1947). The tax imposed by N.J.S.A. 48:4-20 is an excise for the privilege of using the highways in the State, and this Court has held that a state has a right to place such a burden on interstate commerce in order to require carriers using its highways to contribute to their construction, maintenance and supervision, and the administration of the regulating statute. *Kane* v. *New Jersey*, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916); *Clark* v. *Poor*, 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702 (1927); *Morf* v. *Bingaman*, 298 U.S. 407, 80 L. Ed. 1245, 56 S. Ct. 756 (1936); and *Interstate Transit* v. *Lindsey*, 283 U.S. 183, 75 L. Ed. 953, 51 S. Ct. 380 (1931). As stated in *Clark* v. *Poor*: "Users of (highways), although engaged exclusively in interstate commerce may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for their use." Again, in *Interstate Transit* v. *Lindsey*, wherein this Court found a Tennessee statute levying a privilege tax on interstate commerce to be a burden on commerce, Mr. Justice Brandeis noted that a state ". . . may impose even upon motor carriers engaged exclusively in inter-

state commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon." (283 U.S. at 185). The decision further held:

> "... As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways or to defray the expense of regulating motor traffic ... Where it is shown that the tax is so imposed, it will be sustained unless the tax payer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory." (283 U.S. at 186).
>
> * * * * *
>
> "It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways ... But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state." (283 U.S. at 190).

Thus, where a tax upon interstate commerce is for the privilege of using the highways, and N.J.S.A. 48:4-20 specifically states that it is "an excise for the use of such highway," the statute is only valid where compensatory, and the amount collected must have a reasonable relation to the costs, expenses, or burdens imposed upon the State. In the absence of any proof of such cost it is unconstitutional.

Respondents have cited *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950) for the proposition that a tax upon interstate carriers which is designed in a broad and general sense to produce fair compensation to the state for the use of its highways will not be construed as a burden upon interstate commerce. In the *Capitol Greyhound* case, however, the tax was used wholly for the related highway purposes, and the appellant in that case never claimed that the charges levied were unreasonable. Moreover, in that case the tax was applied to intrastate as well as interstate carriers.

Safeway Trails, Inc. contends that N.J.S.A. 48:4-20 as applied to its interstate mileage over the New Jersey Turnpike is both unreasonable and discriminatory. The amounts collected under N.J.S.A. 48:4-20 must be expended in accordance with the provisions of N.J.S.A. 48:4-23, and therefore cannot be used for construction, maintenance or supervisory purposes insofar as the Turnpike is concerned. Further, the State of New Jersey is enjoined from expending any sums or giving any financial aid to the New Jersey Turnpike Authority. New Jersey Constitution of 1947, Article VIII, Section 2, paragraph 2; N.J.S.A. 27:23-1; *New Jersey Turnpike Authority* v. *Parsons*, 3 N.J. 235, 69 A. 2d 875 (1949).

N.J.S.A. 48:4-23 appropriates the monies collected under N.J.S.A. 48:4-20 to the State Highway Department, and the New Jersey Supreme Court held in *New Jersey Turnpike Authority* v. *Parsons* that the State Highway Commissioner does not have the right to divert funds appropriated to the State Highway Department or to render services or payments to the New Jersey Turnpike Authority. Thus the sums collected

by the State from appellant for the privilege of using the New Jersey Turnpike cannot be expended in any manner on or for the Turnpike, but are now collected for the general purposes of the State.

Respondents contend, and the New Jersey Supreme Court did so find, that the State of New Jersey "incurs a great many diverse expenses made necessary by the extensive public use of the New Jersey Turnpike and Garden State Parkway." As noted heretofore, the great bulk of such expenses are incurred through the actual operation by the State of New Jersey of certain sections of the Garden State Parkway (Respondents' brief, pp. 18, 19). No dollar figure has been assigned by the State to its alleged expenses incurred on behalf of both toll roads, nor for the New Jersey Turnpike alone, although the subject was exhaustively examined on trial. Such miscellaneous expenses as were alleged by the respondents are at best only incidental to the presence of the Turnpike in the State of New Jersey. They are greatly outweighed by the facilities and access afforded the intrastate traffic of New Jersey provided largely from interstate tolls.

Safeway Trails, Inc. paid $36,611.98 to the State of New Jersey in 1961 pursuant to N.J.S.A. 48:4-20 for mileage traversed over the New Jersey Turnpike in interstate commerce. The sums collected by the State for such interstate mileage over the Turnpike bear no reasonable relation to the privilege of using the Turnpike, particularly when one considers the fact that Safeway Trails, Inc. paid the Turnpike Authority $218,042.00 in 1961 in tolls. As this Court stated in *Ingels* v. *Morf*, 300 U.S. 290, 81 L. Ed. 653, at 294, 57 S.Ct. 439 (1937):

> "To justify the exaction by a state of a money payment burdening interstate commerce it must

affirmatively appear that it is demanded as a reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power."

If it be held that a state can impose and collect a mileage tax on interstate buses operating over highways built and maintained from tolls and without material cost to the state, the burdens imposed by states for internal governmental costs will destroy the interstate carriers and establish the barriers forbidden by the commerce clause.

CONCLUSION

For the reasons above stated, the questions presented by this appeal when correctly stated are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

WILLIAM A. ROBERTS
MORRIS J. LEVIN
1012 14th Street, N. W.
Washington, D. C.
Attorneys for Appellant

ROBERTS & MCINNIS
1012 14th Street, N. W.
Washington, D. C. 20005
Of Counsel